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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 172.

ELMER L. DIRKS, Individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RY. CO., a Corporation,
Petitioners,

vs.

W. L. BIRKHOLZ, RAY GRANGER, THOMAS FOLEY, DAVID TUCIBAT, WAYNE BLACKBURN and MARVIN HOISINGTON, Individually and in Behalf of All Members of the Switchmen's Union of North America, AFL-CIO, Who Are Employed by The Chicago, Milwaukee, St. Paul & Pacific Ry. Co., and SWITCHMEN'S UNION OF NORTH AMERICA, an Unincorporated Association,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONERS.

DAVID PREVIANT,
DAVID LEO UELMEN,
211 West Wisconsin Avenue,
Milwaukee, Wisconsin 53203,
Attorneys for Petitioner Dirks.

JOHN J. NAUGHTON,
120 West Madison Street,
Chicago, Illinois 60602,

CLIFFORD D. HAWLEY,
666 Euclid Avenue,
Cleveland, Ohio 44114,

Attorneys for Petitioner Brotherhood of Railroad Trainmen.

JAMES P. REEDY,
516 West Jackson Boulevard,
Chicago, Illinois 60606,
Attorney for Petitioner Chicago, Milwaukee, St. Paul & Pacific Railroad Co.

Of Counsel:
GERRY M. MILLER,
GOLDBERG, PREVIANT & UELMEN,
211 West Wisconsin Avenue,
Milwaukee, Wisconsin 53203.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

TABLE OF CONTENTS.

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Question presented	4
Statement	5
Summary of argument	12
Argument	14
I. Section 2, Eleventh (c) was enacted solely to protect employees subject to temporary transfers between craft bargaining units from compulsory dual unionism	14
A. This Court's construction of the statutory proviso in Pennsylvania Railroad Co. v. Rychlik, 352 US 480 (1957), is conclusive of its sole purpose to prevent compulsory dual unionism	15
B. Congress, although failing to accept the exact language initially proposed by the trainmen, enacted the agreed-upon language of Sec. 2, Eleventh (c) solely to protect an operating employee who would otherwise face the necessity of changing from one union to another when temporarily changing crafts	21
C. The Congressional purpose in Sec. 2, Eleventh was not to foster "union shopping" but to authorize the contracting parties to stabilize their labor relations by making agreements that eliminated pockets of dissident unionism	31

II. A reading of subparagraph (c) to require that operating employees under union shop agreements be entitled to choose membership in competing unions without collective bargaining responsibilities defeats the basic purposes of Sec. 2, Eleventh 33

A. Only statutory bargaining representatives, not unions without contracts, come within the controlling concern of the 1951 amendments 34

B. The decision below encourages employees to avoid paying for the cost of collective bargaining on their behalf by holding that they must be permitted to contribute "nominal" dues to a competing union 42

Conclusion 44

Table of Cases Cited.

Brotherhood of Railroad Trainmen v. Akron & Barberton R. R. Co., 385 F. 2d 581 (D. C. Cir. 1967), cert. den., 390 US 923 (1968) 39

Brotherhood of Railway and Steamship Clerks, etc. v. Allen, 373 US 113, 121, note 7 (1963) 38

Conley v. Gibson, 355 US 41, 46 (1957) 38

Douds v. Local 1250, Retail, Wholesale, etc. Union, 173 F. 2d 764 (2d Cir. 1949) 38

Federal Telephone and Radio Company, 107 NLRB 649, 653 38

Felter v. Southern Pacific Company, 359 US 326, 336, 337 (1959) 20

Holy Trinity Church v. United States, 143 US 457, 459 (1892) 34

Hughes Tool Co. v. Labor Board, 147 F. 2d 69 (5th Cir. 1945) 38

International Association of Machinists v. Street, 367 US 740, 766 (1961) 7, 11, 17, 21, 30, 35, 37, 38, 40, 43

Labor Board v. Allis-Chalmers Manufacturing Company, 388 US 175, 179 (1967) 34, 44

Labor Board v. General Motors Corp., 373 US 734, 743 (1963), quoting Radio Officers' Union v. Labor Board, 347 US 17 (1954) 44

National Woodwork Manufacturers Assn. v. Labor Board, 386 US 612, 619 (1967) 16, 34

O'Connell v. Erie Lackawana R. R. Co., 391 F. 2d 156, 163 (2d Cir. 1968) 20, 24, 25, 27, 31, 40

Pennsylvania Railroad Co. v. Rychlik, 352 US 480, 488 (1957) 8, 11, 12, 15, 17, 18, 19, 20, 26, 33

Pigott v. Detroit, T. & I. R. Co., 116 F. Supp. 949, 955, note 11, affd. 221 F. 2d 736 (6th Cir. 1955) 43

Railway Employe's Dept. v. Hanson, 351 US 225, 233 (1956) 33, 35

Rohrer v. Conemaugh and Black Lick R. R. Co., 359 F. 2d 127 (3rd Cir., 1966) 8, 11, 19, 30, 40

Steele v. Louisville & Nashville R. R. Co., 323 US 192, 200, 204 (1944) 36

The Youngstown Cartage Co., 146 NLRB 305, 307 ... 38

United States v. American Trucking Assns., 310 US 534, 543 (1940) 17

Virginia Ry. Co. v. System Federation No 40, 330 US 550 at 548 (1937) 37

Statutes Cited.

28 U. S. C., § 1254 (1) 2
28 U. S. C., § 1337 (A-4) 10
29 U. S. C., § 158 (a) (3) 7
45 U. S. C., § 151 et seq. 10

Public Law 88-108 (77 Stat. 132) 39
Railway Labor Act, 45 U. S. C., § 152,
Eleventh 2, 4, 6, 8, 9, 12, 14, 15, 16, 24, 25, 35, 37, 42

Texts Cited.

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Wellington, "Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues," 1961 Sup. Ct. Rev., pp. 55, 59: "The statutes are twins" 30

Other Authorities.

96 Cong. Rec. 25, 26, 27, 28, 29, 30, 31
Award, Arbitration Board No. 282, 41 L. A. 673, 693, BNA Washington, D. C. (1964) 39
Hearings Before a Subcommittee of the Committee on Labor and Public Welfare, on S. 3295, 81st Cong., 2d Sess. ("Senate Hearings"), p. 1, House Hearings, p. 1 .....21, 24
Hearings Before the Committee on Interstate and Foreign Commerce, on HR 7789, 81st Cong., 2d Sess. 7, 21
H. R. Rep. No. 2811, 81st Cong., 2d Sess., pp. 5-6 .....23, 28, 30
H. R. 7789, 81st Cong., 2d Sess., p. 257 (House Hearings) 7
NMB Rules and Regulations, Section 1206.2, 29 CFR, Ch. X 6
Thirty-third Annual Report, National Mediation Board, pg. 98 .....5, 41
Twenty-fifth Annual Report, supra, pg. 89 20
Twenty-first Annual Report, supra, pg. 75 20
Twenty-ninth Annual Report 41
Twenty-second Annual Report 41

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The corrected opinion of the United States Court of Appeals is reported at 391 F. 2d 289 (A. 111). The findings of fact and conclusions of law of the United States District Court for the Northern District of Illinois, Eastern Division, are not officially reported (A. 102).[1]

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit reversing the judgment of the United States District Court and remanding the cause for further proceedings consistent with the opinion was en-

[1] They are unofficially reported at 65 Labor Relations Reference Manual, p. 2513 (BNA, Washington, D. C.).

tered on February 12, 1968 (A. 122). An order was entered on May 13, 1968, by Mr. Justice Thurgood Marshall extending the time for filing a petition for a writ of certiorari to June 10, 1968. The petition for a writ of certiorari, filed on June 7, 1968, was granted on October 14, 1968. The jurisdiction of this Court rests upon 28 U. S. C., § 1254 (1).

STATUTE INVOLVED.

The relevant provision of the Railway Labor Act ("Act") is Section 2, Eleventh, 64 Stat. 1238, 45 USC, § 152, Eleventh:

> "Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> "(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly

required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which

he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended."

QUESTION PRESENTED.

A railroad and the exclusive bargaining representative of its yard and certain train service employees entered into a union shop agreement requiring such employees to belong to their statutory bargaining agent or to any one of the labor organizations national in scope and organized in accordance with the Act that contracts with the railroad for employees in such services. The question presented is whether this union shop agreement violates the Railway Labor Act if its obligations are not satisfied by membership in a rival, minority union that supports a labor member on the First Division of the National Railroad Adjustment Board, but does not contract with the railroad.

STATEMENT.

Petitioner Brotherhood of Railroad Trainmen ("Trainmen") has, since 1926, served as the duly designated exclusive bargaining representative of yard service employees of petitioner Chicago, Milwaukee, St. Paul & Pacific Railroad Company on its Lines East ("Carrier") (A. 102, ¶ 1; 112).[2] Through its General Grievance Committee[3] chaired by petitioner Elmer L. Dirks, the Trainmen negotiates and administers comprehensive collective bargaining agreements setting forth the rates of pay, rules and working conditions for all of the Carrier's yard service employees. These representation activities are financially supported only by employees of the Carrier who belong to the Trainmen (A. 103, ¶ 2).[4]

The Trainmen and respondent Switchmen's Union of North America ("SUNA") are each "national in scope"

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[2] Except for the Order of Railway Conductors & Brakemen ("ORC&B") which bargains collectively for the Carrier's conductors, the Trainmen is the statutory representative of all of the Carrier's employees in yard and train service, including brakemen, flagmen and baggagemen as well as yard foreman, helpers and switchtenders. The Brotherhood of Locomotive Engineers ("BLE") and Brotherhood of Locomotive Firemen and Enginemen ("BLF&E") represent the crafts of engineers and firemen on the property. Thirty-third Annual Report of the National Mediation Board for Fiscal Year Ended June 30, 1967 ("33d Annual Report"), p. 98.

[3] "The local chairmen [of the grievance committees of the subordinate lodges] on a single railroad . . . comprise the general committee that is in charge of the collective bargaining and grievance work on that line. The chairman of a general committee is the most important union functionary on the road, except when, at his request, an officer of the Grand Lodge is sent on the property to assist him." Seidman, *The Brotherhood of Railroad Trainmen* (J. Wiley and Sons, 1962), pp. 2-3.

[4] "The office of the general chairman, along with the other expenses of the general committee, is financed by a general grievance assessment upon all members under the committee's jurisdiction." It is normally the largest component of the levy upon the membership. Seidman, *op. cit.*, p. 32 and p. 28.

and "organized in accordance with" the Act. Each admits to membership yard service employees and designates one of the five labor representatives on the National Railroad Adjustment Board, First Division ("Adjustment Board" or "First Division") (A. 103, ¶ 3; 112).[5] However, the two organizations are rivals for yard service workers on the nation's railroads (A. 107, ¶ 7) and on November 14, 1966, after a campaign of soliciting representation authorizations from among the Trainmen's yard service membership,[6] SUNA petitioned the National Mediation Board ("Mediation Board") under Section 2, Ninth of the Act for a representation election on both lines east and lines west in which to wrest bargaining rights for these employees from the Trainmen (A. 105, ¶ 8).[7]

Since 1926, SUNA has not negotiated collective agreements with the Carrier, has not been certified or recognized as the bargaining agent for any of its employees, and has not had obligations under the Act to them (A. 104, ¶ 5; 106, ¶ 4). However, SUNA and the Trainmen have joined forces to "represent . . . their respective members . . . on occasion, in the negotiation of particular

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[5] The practice is for each of the "qualified" operating organizations (BLE, BLF&E, ORC&B, SUNA and the Trainmen) to designate one of its vice presidents to sit on the Adjustment Board (A. 67-68). "The NRAB procedures cost the . . . labor organizations only the salaries [i. e. time] of their representatives on the Board. . . . All other costs [including referee fees and expenses] are met by the taxpayers." The majority of First Division cases, and all of the important ones, are deadlocked and submitted to the referees." Mangum, "Grievance Procedures for Railroad Operating Employees", 15 Ind. & Lab. Rels. Rev. 474, 499, 487 (1962).

[6] Of course, nothing in the challenged union shop agreement precludes dissatisfied employees or rival unions from signing or soliciting these documents to support a petition to the National Mediation Board for a change in representatives (A. 40, 63; Pl. Ex. 7, A. 52). See Sec. 1206.2, NMB Rules and Regulations, 29 CFR, Ch. X.

[7] The petition was withdrawn after the district court decision herein, and no election was ordered.

agreements affecting employees on all Class I railroads" and in other matters "of common concern" (A. 104, ¶ 6). Although a SUNA local union has existed over the years for the Carrier's yardmen, its representation work has been limited to "several instances" when its officials processed grievances under the *Trainmen's* collective agreements before the Carrier's officers, and more recently to insisting that the Trainmen process certain grievances on behalf of the SUNA members it represents[8] (A. 105, ¶ 7, 60-61).

Of course, SUNA members contribute no money to the Trainmen's General Grievance Committee (A. 58) and, since SUNA lacks bargaining responsibilities, they need not financially support one of their own.[9] Because its dues vary in amount with the expense of collective bargaining on the property, SUNA is in a position to offer a cheaper membership to the Carrier's yardmen than their statutory representative must charge.[10] SUNA members employed

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[8] The parties modified their investigation rule to prohibit rival union representatives from processing grievances before the Carrier, subsequent to the instances when SUNA had done so (A. 60).

[9] Like the Trainmen, SUNA utilizes the general committee structure (A. 57-58, 43) but produced no evidence that it has ever maintained one for the Carrier's employees. Rather, local officers or vice presidents have handled grievances in the several instances it elected to process them (A. 59).

[10] Operating brotherhoods such as SUNA charge "nominal" dues and then a member "will pay an assessment to finance the activities of the general negotiating committee, known as the general grievance committee on the railroad where he is employed, and he will pay that monthly, and it will vary month by month, based on the expenses and work of that committee." Hearings Before the Committee on Interstate and Foreign Commerce, on HR 7789, 81st Cong., 2d Sess., p. 257 ("House Hearings"). This legislative fact caused Congress in Sec. 2, Eleventh, unlike the corresponding provisions of Taft-Hartley, 29 USC, § 158 (a) (3), to sanction union shop agreements compelling the payment of "assessments (not including fines and penalties)". *International Association of Machinists v. Street*, 367 U. S. 740, 766 (1961).

by the Carrier do not contribute their share of financial support to the Trainmen for the performance of its functions under the Act (A. 105, ¶ 7).

On November 16, 1966, several months after issuance of the Third Circuit's decision in *Rohrer v. Conemaugh and Black Lick R. R. Co.*, 359 F. 2d 127 (3rd Cir., 1966),[11] the Trainmen served notice on the Carrier for amendment of its union shop contract signed on June 9, 1953 (A. 112, Pl. Ex. 8, A. 53). That agreement, after requiring membership in the Trainmen, stated that this duty

> ". . . shall be satisfied if any employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with the . . . Act and admitting to membership employees of a craft or class in train, yard, engine or hostling service, that is, in any of the services, or capacities, covered by Section 3, First, (h) of the Railway Labor Act, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board; provided, however, that nothing . . . shall prevent any employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of the services above specified" (Pl. Ex. 8, A. 53).

Under this agreement, which borrowed the "disarmingly clear" language of the statute,[12] a number of yardmen

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[11] *Rohrer* held lawful under Sec. 2, Eleventh (c) a union shop agreement that precluded an operating employee from satisfying its requirement by holding membership in an alternate union "national in scope" that did not contract with the railroad.

[12] *Pennsylvania Railroad Co. v. Rychlik*, 352 U. S. 480, 488 (1957). Rychlik, a trainman, resigned from the contract-holding union and was discharged after joining UROC, a rising new union not qualified under § 3, First. The Court held that § 2, Eleventh (c) "allows alternative union membership only in those unions . . . already qualified under § 3, First, as electors of the union representatives on the . . . Adjustment Board, and not member-

represented by the Trainmen, including the individual respondents, held membership in SUNA, even though it had not contracted with the Carrier for 40 years (A. 103, ¶ 3).

On February 1, 1967, the Trainmen and the Carrier entered into an amended union shop agreement drafted to limit alternative membership rights to those employees who would otherwise face the necessity of changing from one union to another when temporarily changing crafts:

> "Section 1.
>
> (a) * * * all employees of the company * * * except as hereinafter provided, shall, as a condition of their continued employment * * * become members of the Brotherhood within sixty calendar days * * * and thereafter shall maintain membership in the Brotherhood; * * *
>
> (b) It is agreed, as a condition of continued employment, all employees of the company shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, having a labor contract with the C. M. St. P. & P. Railroad Company (lines East), covering employees of a craft or class in train or yard service; provided further, however, that the right of a yardman, who does not hold interchangeable rights, to acquire or hold membership in an organization shall be confined to the Brotherhood" (Pl. Ex. 9, A. 54-55).

From the face of these provisions, yardmen know or can easily ascertain that they must belong to the Trainmen, except that those holding seniority rights in another class

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ship in any union which happens to be, as a matter of fact, national in scope and organized in accordance with the Act." 352 U. S. at 485. Before his discharge Rychlik also joined SUNA, but no question arising out of that membership was presented to the Court, 352 U. S. at 484, note 9.

in train or yard service, may choose between membership in the Trainmen and any other "qualified" labor organization having a labor agreement with the Carrier covering employees in such service.[13] Since SUNA lacks a labor agreement with the Carrier, membership in that organization could not satisfy the requirements of the union-shop agreement (A. 104, ¶ 5).[14]

SUNA and five of its individual members then brought this action for declaratory judgment, injunctive relief and damages, invoking federal jurisdiction to determine the validity of the amended union shop agreement under the Railway Labor Act, 45 USC, § 151 et seq. and 28 USC, § 1337 (A. 4).[15] After a trial on the merits but at the conclusion of the plaintiffs' evidence, the district court granted petitioners' motions to dismiss the complaint in its entirety, and entered judgment in favor of petitioners (A. 109-110).

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[13] Thus, the amended agreement leaves all train service employees and those yard service employees holding seniority rights as conductors open for membership solicitation by rival organizations who contract with the Carrier for employees in train or yard service, *i. e.,* the Trainmen and ORC&B. The agreement limits the choice to unions holding labor agreements covering train or yard service because seniority operates solely within such services but not between train or yard service and engine service. "Seniority Practices—Railroad Operating Employees and Other Industries", *Studies Relating to Operating Employees,* Appendix Volume III to the *Report of the Presidential Railroad Commission* (GPO, Washington, D. C. Feb. 1962), pp. 231-232.

[14] Questions involving the validity of petitioners' limitation of alternate membership to yardmen holding interchangeable seniority rights and to unions that contract for train or yard service employees are not presented on the facts here, since the individual respondents allege that they "desire to belong only" to SUNA and thus are aggrieved solely because SUNA does not contract with the carrier (A. 10).

[15] The district court overruled challenges to its jurisdiction based upon the exclusive jurisdiction of the First Division to interpret and apply labor agreements and of the Mediation Board to determine whether conduct has interfered with employee free choice in representation election under the Act (A. 38-42). Petitioners did not seek certiorari as to these questions.

Relying upon this Court's decisions in *Pennsylvania Railroad Co. v. Rychlik, supra,* and *International Association of Machinists v. Street, supra,* and the Third Circuit's decision in *Rohrer, supra,* the district court found that SUNA members were "free riders" that the parties could lawfully contract to eliminate (A. 105, ¶ 7). It also found that the amended agreement "adequately meets the narrow problem of intercraft mobility" on the property, namely "the necessity of changing from one union to another when an employee temporarily changes crafts" (A. 107, ¶ 6). Finally, the district court held, on the evidence presented, that petitioners had not amended the union shop agreement for the purpose of influencing any representation election that the Mediation Board might conduct (A. 105, ¶ 9).

On appeal, the Court of Appeals for the Seventh Circuit reversed the judgment below and remanded the cause for further proceedings consistent with its view that Section 2, Eleventh (c) must be given a "literal reading", i. e., that a union shop agreement covering yard service employees must permit membership in any one of the five "qualified" operating service unions to satisfy its membership requirements (A. 115, 118). The court made its own reading of the legislative history of the 1951 union shop amendments of the Act, dismissing this Court's exhaustive analysis of the matter in *Rychlik* as "dictum" (A. 121), and found Congressional "protection" and "recognition" in Sec. 2, Eleventh (c) of a practice, during the years when union security was prohibited, of membership by a minority of a craft in a rival operating union and of frequent raiding among them (A. 117).

SUMMARY OF ARGUMENT.

Petitioners, a rail carrier and the statutory representative of its yardmen, have entered into a union shop agreement that required membership in the collective bargaining agency or in any one of the qualified labor organizations "having a labor contract with" the railroad. Respondent SUNA, a rival, minority union "national in scope and organized in accordance with the Act" that has not contracted with the railroad for over 40 years contends that Sec. 2, Eleventh (c) of the Act entitles any operating employee of the railroad to belong to SUNA or any one of the other four qualified unions that will admit him to membership.

Petitioners submit that, although the words of subparagraph (c) appear to go further, this language must be limited by construction to its very narrow purpose: to protect all employees from the necessity of changing from one union to another when he temporarily changes crafts. This Court's construction of subparagraph (c) in *Pennsylvania Railroad Co. v. Rychlik,* 352 US 480 (1957), is conclusive of that sole purpose. Contrary to the Court below, no broader aim can be inferred from Congress' failure to adopt the exact language initially proposed in committee hearings by the Trainmen or from the fact that the language of subparagraph (c) was ultimately agreed upon by certain railway unions. SUNA's view that operating employees are entitled to shop for membership among any one of five unions conflicts directly with the legislative purpose to permit contracts that stabilize labor relations by eliminating pockets of dissident unionism within the bargaining unit.

Moreover, a reading of subparagraph (c) to require that operating employees under union shop agreements be permitted to choose membership in competing unions without

collective bargaining responsibilities, defeats the basic purposes of the union shop amendments. Only statutory bargaining representatives, not unions without contracts, come within the controlling concern of the 1951 amendments. Except for support of the Adjustment Board, members of a qualified but non-contracting union share in none of the obligations that led Congress to authorize union shop agreements. Because unions that lack collective bargaining responsibilities are in a position to offer a cheaper membership than the statutory representative must charge, a requirement that their membership satisfy union shop agreements imputes to Congress a purpose to encourage operating employees to join unions without bargaining rights, at the expense of supporting their representative's performance of its functions under the Act.

Therefore, subparagraph (c) cannot be read literally. Its narrow purpose to prevent compulsory dual unionism must be harmonized with the basic provisions of the union shop amendments, mindful of the manifest purpose of Congress to authorize union shop agreements, like the instant one, that require operating employees to contribute their fair share of financial support to a bargaining representative that contracts for a craft in which they may work.

ARGUMENT.

I. SECTION 2, ELEVENTH (C) WAS ENACTED SOLELY TO PROTECT EMPLOYEES SUBJECT TO TEMPORARY TRANSFERS BETWEEN CRAFT BARGAINING UNITS FROM COMPULSORY DUAL UNIONISM.

In amending the Railroad Labor Act to add Sec. 2, Eleventh in 1951, Congress expressly lifted the 1934 prohibitions against union shop and checkoff agreements.[16] Convinced by the unions that the interests of industrial peace would be served by the elimination of "free riders", union shop was legislated for railroad workers on terms essentially similar to those governing other industries, i. e., agreements were authorized to compel all unit employees to belong to the union that negotiates their employment terms.

However, railroad workers were largely organized in craft units, and some, belonging to the union that negotiates for their craft, work temporarily in units for which other unions contract. This occurs principally in the case of firemen and engineers, brakemen and conductors, because of seasonal and other factors. In the absence of a provision accommodating union shop to this situation,

> ". . . such a change from craft to craft, even though temporary, would mean that the employee would either have to belong to two unions—one representing each of his crafts—or would have to shuttle between unions as he shuttles between jobs.

[16] Secs. 2, Fourth and Fifth of the Act guarantee railroad employees complete freedom to choose "to join or not to join" labor organizations and prohibited deduction of union "dues, fees, assessments, or other contributions" by any carrier. Sec. 2, Eleventh (d) amends "provisions in paragraphs Fourth and Fifth of this section in conflict herewith to the extent of such conflict."

> The former alternative would, of course, be expensive and sometimes impossible, while the latter would be complicated and might mean the loss of seniority and union benefits." *Pennsylvania Railroad Co. v. Rychlik,* 352 US at 490."

The solution, enacted as Sec. 2, Eleventh (c), was to permit the fireman or brakeman, if temporarily promoted to engineer or conductor, to satisfy the union shop contract of those crafts by remaining a member of the union that represents the firemen or brakemen.

Petitioners submit that, although the words of Sec. 2, Eleventh (c) appear to go further, this was the sole reason for the alternate union proviso. Therefore, to claim its protection, employees may be required to choose membership only in an alternate union that contracts with the carrier. Only another union entitled to bargain on the railroad could make a union shop agreement that would possibly confront an employee with the problem of compulsory dual memberships, and only if he belongs to one that has statutory bargaining responsibilities to him will the paramount purposes of the 1951 amendments be furthered rather than defeated.

We shall first examine this Court's construction of Sec. 2, Eleventh (c) in *Pennsylvania Railroad Co. v. Rychlik,* 352 US 480 (1957), so that the statutory language is "read, not in a vacuum, but in light of the policies this Section was intended to serve." *Ibid,* p. 488.

A. This Court's Construction of the Statutory Proviso in Pennsylvania Railroad Co. v. Rychlik, 352 US 480 (1957), Is Conclusive of Its Sole Purpose to Prevent Compulsory Dual Unionism.

Section 2, Eleventh (a) authorizes carriers to make union shop agreements only with the statutory, i. e. ma-

jority, representatives of their employees and limits the required membership to "the labor organization representing their craft or class." Subparagraph (c) provides that the membership requirement of an employee in the operating services under an agreement made pursuant to Sec. 2, Eleventh (a) "shall be satisfied" if he "shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with the Act, and admitting to membership employees of a craft or class in any of said services . . ." To this exception there are two provisos. First, when a union shop agreement initially takes effect, an operating employee who does not belong to any one of the unions "national in scope", etc., "may be required" to join the union representing "the craft in which he is employed" on that date; and second, that no agreement "shall prevent an employee from changing membership in one organization to another organization admitting to membership employees of a craft or class in such services."[17]

Recourse to the legislative purpose of the language is appropriate even if the words of Sec. 2, Eleventh (c) appear to require that an operating employee must always be permitted to choose membership in "any" one of the five unions "national in scope".[18] Reliance upon the legislative purpose below the surface of the words, yet fairly a part of them, is warranted if the plain meaning of the language leads "to absurd or futile results."

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[17] Sec. 2, Eleventh (b) authorizes carriers to make checkoff agreements only with the statutory representatives of their employees and to pay the amounts deducted only to the "labor organizations representing the craft or class of such employees." Subparagraph (c) states that "no [checkoff] agreement shall provide for deductions from his [an alternate union member's] wages for periodic dues [etc.] . . . . payable to any labor organization other than that in which he holds membership."

[18] *National Woodwork Manufacturers Assn. v. Labor Board*, 386 US 612, 619 (1967).

> "Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole', this Court has followed that purpose rather than the literal words."[19]

We ask that the Court continue to construe the words of Sec. 2, Eleventh (c) cautiously and purposively: in accord with the reasons "accepted by Congress" rather than historical practices or the unaccepted, supposed interests of its proponents.[20]

The legislative purpose and history of subparagraph (c) was before this Court in *Rychlik, supra,* and that decision contains an exhaustive and dispositive analysis of its "sole" and "very narrow" purpose:

> ". . . the purpose of Congress was not . . . to help dissident or rising new unions recruit new members. Rather, the sole aim . . . was to protect employees from the requirement of dual unionism in an industry with high job mobility." 352 US at 488 489.
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> ". . . the only purpose of § 2, Eleventh (c) was a very narrow one: to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts . . . [It was not intended] to provide employees with a general right to join unions other than the desig-

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[19] *United States v. American Trucking Assns.*, 310 US 534, 543 (1940). Union shop legislation is unreasonable if it compels that an engineer be permitted to belong to a yardmen's organization in satisfaction of a membership requirement in engine service. It is futile if agreements authorized to require financial support for the collective bargaining agency have to be satisfied by membership in a union that does not collectively bargain. It is absurd if it requires union shop agreements that encourage membership in organizations lacking statutory responsibilities, at the expense of those that must fulfill them. See pp. 33-43, *infra.*

[20] *Street,* 367 US at 768. *Rychlik,* 352 US at 488.

> nated bargaining representative of their craft, except to meet the narrow problem of intercraft mobility. This is made particularly clear when the provision is taken in the context of American labor relations in general. 352 US at 492-493.
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> ". . . [O]nce a union has lawfully established itself for a period of time as the authorized bargaining representative of the employees under a union shop contract, Congress has never deemed it to be a 'right' of employees to choose between membership in it and another competing union . . . The purpose of § 2, Eleventh (c) was simply to resolve the problem of intercraft mobility under railroad union shop contracts," 352 US at 494.

The opinion points to the proviso requiring a non-union employee to join the bargaining representative rather than "even such competing unions which are concededly national in scope" when a union shop agreement first takes effect, as "completely negat[ing] the argument that the purpose of the statute was to allow employees to *choose* between unions." 352 US at 492, note 29.

Though it pays lip service to the "intercraft mobility" language in *Rychlik*, the court below has rejected the "very narrow" dimensions that this Court has ascribed to the problem and, standing *Rychlik* on its head, finds that Congress "deliberately chose" to perpetuate pockets of dissident unionism for their own sake, "to avoid upsetting the balance of union power . . . within the bargaining unit" (A. 120). But subparagraph (c), *Rychlik* teaches, was not enacted to help unions that lost their majority, "due to an influx of transferees from another craft" or for any other reason, because the exception was not enacted to help unions. It was designed solely "to protect *employees* from the *requirement* of dual unionism," 352 US at 488-489. Its purpose was "simply to resolve the problem of intercraft mobility under railroad union shop *contracts*",

352 US at 494 (Emphasis ours). A union that has lost bargaining rights cannot contract for union shop, and unless a union shop contract requires the membership, "Congress has never deemed it to be a right of employees to choose between membership in [the bargaining representative] and another competing union", 352 US at 494. Once a union has lost bargaining rights on a property, Congress has never allowed its members to avoid contributing to the costs of collective bargaining, simply because they may desire to maintain internal union benefits. It follows that Congress intended to tolerate only so much of "a balance of union power" within a craft as was essential "to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee changes crafts," 352 US at 492.

Rohrer v. Conemaugh & Black Lick R.R. Co., 359 F. 2d 127 (3d Cir., 1966), following *Rychlik*, permits the statutory representative to tailor the right to belong to alternate unions to the actual problem of intercraft mobility existing on the property. There, because the bargaining agent represented all crafts and classes on the line, the court sustained a union shop agreement that precluded membership in any alternate qualified union, since Rohrer could not possibly be "faced with the dilemma of intercraft mobility", and in its absence, Congress did not mean "to provide a right to an employee under a union shop contract to choose between membership in the authorized bargaining representative and a competing union."[21] The instant union shop agreement, limiting alternate membership to unions that contract with the Carrier, fits precisely within the *Rohrer* holding, even though it covers a multicraft rather than an all-craft unit.

Petitioner's union shop contract, although it limits alternate membership rights to contracting qualified unions,

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[21] 359 F. 2d at 131, 130.

does not, as the court below believes, make the last proviso to subparagraph (c) "devoid of meaning" (A. 118-119). That proviso, prohibiting agreements that "prevent an employee from changing membership from one organization to another" qualified union, simply insures that operating employees will be:

> "open for solicitation by rival organizations . . . within the area where even a worker under a union shop contract can change affiliations, see *Pennsylvania R. Co. v. Rychlik,* 352 US 480, 492-494".
> *Felter v. Southern Pacific Company,* 359 US 326, 336, 337, (1959).[22]

An area for rivalry, for dropping membership in one contracting union and joining another, is inherent in the statutory purpose to accommodate intercraft mobility. But the perimeters of that area, as the Court emphasized in *Felter,* are set out in that section of the *Rychlik* opinion that limits subparagraph (c) solely to the exigencies of employees who shuttle back and forth under railroad union shop contracts.

The decision below holds *Rychlik* to be inconclusive as to the legislative purpose of subparagraph (c) because, as

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[22] Felter was a conductor on the Southern Pacific's Pacific Lines who dropped membership in the Trainmen under its contract and joined ORC&B. Though it was "not clear" to the Second Circuit in *O'Connell v. Erie Lackawana R. R. Co.,* 391 F. 2d 156, 163 (2d Cir. 1968) that ORC&B represented conductors on Felter's road, it is apparent from those Mediation Board annual reports showing bargaining rights closest to the period in question (April, 1957), that it did. 21st Annual Report, p. 75; 25th Annual Report, p. 89. Felter could arguably have been restricted, as a conductor, to "holding" a membership in the Trainmen acquired while a brakeman, were it not for the last proviso to subparagraph (c). The union shop agreement here, which invokes conditions implicit in the statutory purpose, similarly gives full effect to the last proviso by leaving train service workers and those yard service employees holding seniority rights as conductors, free to change membership from one contract-holding organization to another qualified contracting union.

we next discuss, the court was led astray as to the significance of Congress' failure to adopt certain statutory language proposed by the Trainmen and of its acceptance of language agreed upon by certain union proponents.

B. Congress, Although Failing to Accept the Exact Language Initially Proposed by the Trainmen, Enacted the Agreed-Upon Language of Sec. 2, Eleventh (c) Solely to Protect an Operating Employee Who Would Otherwise Face the Necessity of Changing From One Union to Another When Temporarily Changing Crafts.

The union shop bills first introduced before both committees by Railway Labor Executives' Association ("RLEA") spokesman George M. Harrison,[23] authorized agreements compelling all employees, without exception, to belong to "the labor organization representing the craft or class", unless the union refused admission "because of membership in any other labor organization."[24] Stressing that it would discourage raiding, unrest and the existing unhealthy "rivalry among train service organizations for the . . . support of the men", Harrison explained that his bill was designed to force all minority union members within a craft into the organization that held the contract. House Hearings, pp. 36, 41, 249. Trainmen spokesman Harry See, in his testimony, pointed out the dilemmas that would result from intercraft mo-

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[23] His statements have been deemed authoritative as to the purpose of the legislation. *Street, supra,* 367 US at 761. Since neither BLE nor the Trainmen belonged to RLEA at the time, Harrison spoke for the non-operating unions, SUNA, BLF&E and ORC&B. House Hearings, pp. 6, 89-90.

[24] Hearings Before a Subcommittee of the Committee on Labor and Public Welfare, on S. 3295, 81st Cong., 2d Sess. ("Senate Hearings"), p. 1, House Hearings, p. 1.

bility under ordinary union shop contracts, supported the purposes but opposed the language of the RLEA bills for this reason, and proposed to substitute an amendment of Sec. 2, Fifth with the following proviso:

> "provided that when two or more crafts or classes are closely related as respects the work performed by each and employment rights in more than one of them are held by the same employee, or promotions from one of such crafts or classes to another are had, the requirement for membership shall be satisfied by membership in the organization of the employee's choice, which is the duly designated or recognized craft or class representative of any one of them." House Hearings, pp. 32-33, Senate Hearings, p. 69.

There was no "real difference", Harrison testified, between RLEA and the Trainmen as to the existence and limited scope of the problem, or its resolution by permitting membership in one contracting union by such workers to satisfy the union shop agreement of the other:

> ". . . what we had in mind . . . was that when the unions negotiated with the railway companies for the union-shop agreement . . . they would provide in the agreement that when men were temporarily promoted and not regularly assigned to the higher group, they would be regarded as still coming under the agreement where they hold their primary rights . . . We thought that we might get bogged down into a lot of detail if we undertook to write all of this details into law. You see, all we suggest here is that the present prohibitions in the law . . . be eliminated and that the parties be left free to negotiate out those questions . . ." House Hearings, pp. 35-36.
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> ". . . It was our thought that the man would join the union that held the labor contract where they had their primary employment rights, and if they

were just temporarily working as conductors because of a seasonal rush in business, they would not be required to join the conductors, because of not being regularly employed within that group. He would be a regular employee as a trainman. The same thing would hold true with the fireman * * * I understand, that some of these trainmen when they are promoted to conductors continue to hold their membership in the trainmen's organization for one reason or another, and they do not join the conductors. If this bill became law and we negotiated the kind of union shop agreement we are talking about, those fellows would be required to join the conductors." House Hearings, p. 79.

". . . as I understand Mr. See's proposal, if an employee were engaged in the train service he would be compelled to join one of the train-service organizations . . . [I]t is on that . . . proposition that we disagree with Mr. See. If there is any merit whatever to the bill now before you that I am supporting, it is that the employee should support the union that negotiates the contract for his wages and working conditions . . . If he wishes to affiliate with some other union that does not bargain for him, that is his business . . . [For those actually shuttling back and forth] we have got to work that out because it would be unfair . . . to compel the man to support the two unions . . ." House Hearings, p. 81.

The RLEA bill was reported favorably from both committees, with a comment in the House Report that "questions . . as to the status of employees who are temporarily promoted from one closely related craft or class to another . . should be resolved by negotiation and collective bargaining.[25]

[25] HR Rep. No. 2811, 81st Cong., 2d Sess., pp. 5-6.

The court below, and the Second Circuit in *O'Connell v. Erie Lackawanna Railroad Co.*, 391 F. 2d 156, 160 (2d Cir., 1968)[26] infer from committee rejection of the Trainmen's proposal that Congress did so to protect members whose union lost its majority and, generally, to recognize non-contracting unions under union shop agreements in the operating crafts. To the contrary, three essential conclusions emerge from the committee proceedings. First, the Trainmen's definition and ultimate solution of the intercraft mobility problem was accepted by all. Second, See's language was opposed, not from the standpoint that it failed to protect membership in non-contracting unions, but because it permitted employees primarily working under one union's contract to satisfy its union shop requirement by keeping membership in a union that contracted for another craft. Third, the legislators agreed that those "very difficult and vital" adjustments necessary to accommodate union shop agreements to "the intricacies of different types or character of employment" on the various properties, without compelling membership in more than one contracting union or permitting employees to avoid supporting the union that negotiates for their primary craft, should be left to negotiations among the unions and with the carriers.[27] In sum, as citation to See's testimony and the Trainmen's proposed language in *Rychlik* suggests, 352 US at 490, note 21, the committee proceedings in their entirety *support* the view that the only purpose of § 2, Eleventh (c) was to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts.

The proceedings on the floor of both Houses show merely that Congress concluded that certain employee

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[26] Certiorari granted October 14, 1968; No. 158, October Term, 1968.

[27] Rep. Dolliver, House Hearings, p. 36; Rep. Wolverton, House Hearings, pp. 40-41.

"safeguards" should be spelled out in the statute rather than left to the collective bargaining process, 96 Cong. Rec. 16329. When the bill was presented on the Senate floor, Senator Hill, its manager, offered a committee amendment to Sec. 2, Eleventh (a) providing that "no such agreement shall require membership in more than one labor organization", 96 Cong. Rec. 15735. In introducing the amendment, Senator Hill explained:

> "It is the intent of this proviso to assure that in the case of . . . [temporary] promotion or demotion, as the case may be, the employee involved shall not be deprived of his employment because of his failure or refusal to join the union representing the craft or class in which he is located if he retains his membership in the union representing the craft or class from which he has been transferred." 96 Cong. Rec. 15736.

Literally, of course, no single agreement would require membership in more than one union; the problem of compulsory dual unionism arises when two or more contracts are juxtaposed and temporary intercraft transfers occur under them. Therefore, because of doubts by operating unions that "this amendment does what it says", Majority Leader Lucas, to make its legislative history unmistakable, referred to Senator Hill's "clear and convincing" explanation as the "true meaning or interpretation" of the amendment in an effort to "clear up" the controversy. 96 Cong. Rec. 15736.[28]

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[28] In support of its literal reading of subsection (c), the Second Circuit in *O'Connell, supra,* 391 F. 2d at 160, cites a statement by Senator Hill that an employee "could belong to as many different unions as he wished to . . . but . . . he cannot be required to pay dues to or belong to more than one union." Since this was merely to confirm, in the words of the question it answered, that "there is no prohibition within the bill that would deny anyone the right to belong to one or several organizations," the remark means no more than that the statute did not foreclose multiple memberships, if that is what the worker desired, and does not detract from

No action was taken on this amendment, due to an adjournment and because all standard operating unions but SUNA were still dissatisfied with the lack of "definiteness [in the language] of the protection afforded operating employees against being compelled to belong to more than one union," 96 Cong. Rec. 17059, 16261.[29] On December 6, 1950, the day before the amendment was offered by Senators Hill and Taft, representatives of the operating and non-operating unions met and except for BLE, reached agreement on the language of subparagraph (c), 96 Cong. Rec. 16189-16190.

In these circumstances, Senator Hill's explanation of its purpose should, as *Rychlik* indicates, 352 US at 492, be accorded particular weight. He explained that the language merely "carries out what was intended by the committee" in the previous amendment—"that no railway employee should have to belong to more than one union", 96 Cong. Rec. 16261:

> "The amendments do nothing more nor less than . . . what was the intent of the committee in offering its amendment, that no employee of a railroad should be required to belong to more than one labor organization. The only difference between the committee amendment and the amendments now before the

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his earlier, carefully prepared explanation of committee intent. 96 Cong. Rec. 15736. In any event, as Mr. Justice Frankfurter observes, a "loose statement even by a chairman of a committee, made impromptu in the heat of debate, less informing in cold type than when heard on the floor, will hardly be accorded the weight of an encyclical." Frankfurter, "Some Reflections on the Reading of Statutes", in *The Record of the Association of the Bar of the City of New York,* Volume 2, No. 6 (1947), p. 234.

[29] At least one of them (BLE) also feared that a "union card in the waiter's union" might be construed to satisfy the membership requirement of union shop contracts "in the other 127 different crafts and/or divisions of crafts" of railroad employees. 96 Cong. Rec. 17052.

> Senate, . . . is that [the latter] . . . spell out in much more detail the purposes of the committee amendment than did the committee amendment. But the intent and purpose of the [two] . . . are exactly the same." 96 Cong. Rec. 16268.

Based on this explanation, the amendment was added to the bill on December 7, 96 Cong. Rec. 16268.[30] The following day, Senator Hill rejected the notion, expressed by an opponent of the bill, that the amendment "completely changed its application in important fields" by making "membership in one union among the operating brotherhoods sufficient":[31]

> "I wish to repeat what I said yesterday, namely there is no difference between the intent of the amendment reported by the committee and the intent of the amendment which the distinguished senior Senator from Ohio and I offered yesterday and which the Senate adopted." 96 Cong. Rec. 16322.

Rather, when asked what "additional requirements" his measure would impose on promoted members of the firemens' union or demoted members of the engineers' union, Senator Hill repeatedly emphasized that union shop

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[30] Immediately afterwards, Senator Hill again emphasized the limited dimensions of the problem: ". . . a man may be a brakeman today and may be promoted to be a conductor tomorrow, and he may be a conductor for 30, 60 or 90 days, and then he may be dropped back to be a brakeman again. He might be a fireman today; but tomorrow he might be promoted to be an engineer . . . for 90 days or 120 days . . . and then . . . demoted to fireman. . . . The only purpose of the amendment is to make sure that a person employed by one of the railroads does not have to belong to more than one union." *Ibid.*

[31] Therefore, the weight given this remark in the Second Circuit's *O'Connell* opinion, 391 F. 2d at 161, is unwarranted, not only because Senator Holland was a staunch foe of the bill, but because its floor manager immediately repudiated that implication as to its intent.

agreements could limit the choice to "one or the other of these two organizations."[32] After these unequivocal assurances of the sole intent of subparagraph (c), the bill survived several requests that it be returned to committee for further consideration of its meaning and effect on unions in the operating crafts, 96 Cong. Rec. 16331, and passed the Senate as S. 3295 on December 11, 1950, 96 Cong. Rec. 16378.

The House agreed to substitute S. 3295 for the bill reported from its committee under a special rule prohibiting amendment, debated and passed it on January 1, 1951, 96 Cong. Rec. 17059, 17062. Discussion of subparagraph (c) on the House floor is, we submit, completely consistent with the limitation to contracting unions implicit in its purposes. Calling it "the provision against double membership", Representative Hugh Scott said it was enacted "to prevent employees who regularly move back and forth between various crafts from being required to join more than one union", 96 Cong. Rec. 17055-56. Representative McGuire, who reported the bill to the House on behalf of the Committee on Interstate and Foreign Commerce, was explicit in limiting the choice afforded by subparagraph (c) to unions with bargaining rights on the property.[33] And Representative Harris' remarks,

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[32] "Under this measure, if there were a collective bargaining agreement he would have to belong to one or the other of those two organizations . . . The choice would be his." "Under the bill as now amended, if an employee is now a member of the fireman's organization [but goes to work as an engineer], he has a right to make his choice as to whether he will remain in that organization or move up to the engineer's organization." 96 Cong. Rec. 16329.

[33] See HR Rep. No. 2811. McGuire stated: ". . . the bill now before the House S. 3295, is substantially identical to the bill reported by our Committee, the only difference being language agreed to by the railway labor organizations themselves, for the purpose of clarifying the section dealing with union membership requirements, where employees hold rights in more than one class or craft, *and where different organizations hold the bargaining rights*

that a "possible requirement of dual membership" was "specifically" resolved by subparagraph (c), do not reflect a broader purpose that others had discussed, 96 Cong. Rec. 17059.

Therefore, although the exact language initially proposed by the Trainmen limiting alternate membership to contracting unions does not appear in subparagraph (c) as adopted seven months later, the proceedings in both houses, like the committee hearings, do not expand the scope of the very narrow problem it raised nor reflect a legislative purpose to limit union shop more than was essential to resolve it. The initial committee amendment modified the committee's approach, permitting the parties to work out the "intricacies" of the problem on the properties, only to the extent that it prohibited an agreement from requiring membership in more than one union.

In contrast, the Trainmen's proposal would not only have extended alternate membership rights to all railway employees in all unions but have precluded the parties from compelling an employee who worked primarily in one craft from supporting his bargaining representative. The final amendment, agreed upon at the last minute, was accepted as merely a recasting of the imprecise prohibition into an affirmative employee right and a "fencing out" of employees and unions that were not concerned with the problem. It was, as Senator Hill said, "exactly similar to the committee amendment, except that it spelled out in more detail the *safeguards* which were deemed necessary in order to properly do the job." 96 Cong. Rec.

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in such crafts or classes. This generally applies to what is termed train and engine service employees. *Under such circumstances,* such an employee could not be required to hold membership in more than one *such* organization. The very fact that these organizations worked this out for themselves for the protection of the individual employee demonstrates their sincerity and good faith." 96 Cong. Rec. 17058 (Emphasis ours).

16329. (Emphasis ours.) The "national in scope" limitation on the unions to which an employee may transfer or in which he may remain had "no effect on the purpose of the amendment . . . [except to assure] that Eleventh (c) would not become a device by which a new or rising union could lure away employees who were already represented by a qualified labor organization" *Rohrer v. Conemaugh & Black Lick R. R. Co., supra,* 359 F. 2d at 131; *International Association of Machinists v. Street, supra,* 367 U. S. at 764, note 15.

Congress enacted the bill to extend to railway labor union shop rights on the same terms as previously had been extended to employees and employers in the Labor Management Relations Act,[34] and both Houses relied upon Senator Taft's assurance, after the language of subparagraph (c) had been worked out, that the bill which included it gave railroad unions "almost the exact provisions, so far as they fit, of the Taft-Hartley law", 96 Cong. Rec. 16267, 17054. With respect to subparagraph (c) in particular, Senator Hill explained that, simply because of a "peculiar situation" in the railroad industry, the amendment was necessary to make the railway union shop "coincide" with the provisions of Taft-Hartley, 96 Cong. Rec. 16268.[35] Since competitive unionism under union shop agreements is impossible under the Taft-Hartley provisions,[36] we submit that the sole purpose accepted by Congress for subparagraph (c) was simply what the legislature said it was—to protect operating

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[34] HR Rep. No. 2811, p. 4; S. Rep. No. 2262, 81st Cong., 2d Sess., p. 3 (1950). Wellington, *"Machinists v. Street*: Statutory Interpretation and the Avoidance of Constitutional Issues," 1961 *Sup. Ct. Rev.*, pp. 55, 59: "The statutes are twins."

[35] See also 96 Cong. Rec. 16323.

[36] Levinson, "Union Shop Under the Railway Labor Act", 6 Lab. L. J. 441, 444, 452.

employees who would otherwise face the necessity of changing from one union to another when temporarily changing crafts.

C. The Congressional Purpose in Sec. 2, Eleventh Was Not to Foster 'Union Shopping' But to Authorize the Contracting Parties to Stabilize Their Labor Relations by Making Agreements That Eliminated Pockets of Dissident Unionism.

The decision below not only imputes to the alternate union proviso a purpose that Congress never accepted, it is one directly contrary to a declared aim of the statute. By 1934 operating employees on Class I railroads were almost fully organized in the national unions:[37] Thereafter, SUNA was in "continuous jurisdictional conflict" with the Trainmen over yardmen.[38] BLE and BLF & E were "traditional rivals of each other as is equally true" of ORC & B and the Trainmen.[39] Congress did indeed legislate Sec. 2, Eleventh with the history of representation disputes and rivalry among operating unions in mind.[40]

Unhealthy union rivalry, Harrison testified, existed in particular "among train service organizations", House Hearings, p. 37; and union shop agreements would discourage it by eliminating the pockets of dissident unionism that served as its base:

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[37] Lecht, *Experience Under Railway Labor Legislation* (Col. U. Press, New York, 1955), p. 154.

[38] Kaufman, *Collective Bargaining in the Railroad Industry* (Kings Crown Press, Col. U., New York, 1954), p. 50.

[39] Levinson, "Railway Labor Act—The Record of a Decade", 3 Lab. LJ 13 at 26-27 (Jan., 1952). "There is a competing zeal between the unions almost to the same intensity as businessmen compete for sales, and the continued contracting of employment opportunities will serve to buttress that rivalry in the long run."

[40] *O'Connell v. Erie Lackawanna, supra,* 391 F. 2d at 162.

". . . the fact that all of the members of a craft or class may be required to join a union as a condition of employment will do much to discourage raiding by other labor organizations. The rivalry between unions will be decreased rather than increased by reason of the fact that the class or craft will be fully organized and all members will belong to the organization representing the members of such class or craft." 96 Cong. Rec. 16264; House Hearings, p. 249.

Harrison's prepared statement to both committees repeatedly emphasized that union shop agreements would promote stability in railroad labor relations by discouraging competition from rival unions without bargaining responsibilities:

"Representation disputes should be reduced under union shop conditions." "The grievance procedure will cease to be a battleground for rival unions." "The union shop makes it more difficult for one union to raid another and thus eliminates or reduces weeks and months of turmoil . . . Employees who participate, through membership, in the formulation of their own . . . working conditions will be much less susceptible to irresponsible appeals and unjustified criticism of rival unions. Where all employees are members . . ., it is just as easy to change the policies . . . as it is to change the collective bargaining representative." House Hearings, pp. 10-11; Senate Hearings, pp. 16-17.

Senator Hill alluded to these considerations in urging its passage "to secure . . . stable, orderly and harmonious relationships between [railway] management and labor." 96 Cong. Rec., 16377.

The court below concludes that Congress legislated to accomplish precisely the contrary result: to "intensify the rivalry among existing standard unions" in the very

sector where it had caused the most concern.[41] Wholly without support in the legislative proceedings, the view that subparagraph (c) was enacted to foster minority unionism for its own sake rests merely upon gratuitous supposition as to the motives of unions who agreed to its language. Rather, Sec. 2, Eleventh represents a "choice by the Congress of the union shop as a stabilizing force", to secure "[i]ndustrial peace along the arteries of commerce", *Railway Employe's Dept. v. Hanson,* 351 US 225, 233 (1956). Because competitive unionism within the bargaining unit conflicts with that purpose, Congress "has never deemed it to be a 'right' [of employees under union shop agreements made by the statutory representative] . . . to choose between it and another competing union"; and its deliberations here show no departure from precedent "except to meet the narrow problem of intercraft mobility", *Rychlik,* 352 US at 494.

II. A READING OF SUBPARAGRAPH (C) TO REQUIRE THAT OPERATING EMPLOYEES UNDER UNION SHOP AGREEMENTS BE ENTITLED TO CHOOSE MEMBERSHIP IN COMPETING UNIONS WITHOUT COLLECTIVE BARGAINING RESPONSIBILITIES DEFEATS THE BASIC PURPOSES OF SEC. 2, ELEVENTH.

Unlike other parts of the Act, the union shop amendments were not added to the statue by agreement of the carriers and the standard railway labor organizations, or even by unanimous agreement of the latter. Rather, they were opposed by virtually all carrier representatives and, among the unions, the attenuated dispute over the alternate union proviso, probably the most controversial pro-

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[41] "Prior to the enactment of the union shop amendment, an employee could reject membership in any union. But, under the present law, if one union does not obtain his membership, another must." Levinson, "Union Shop Under the Railway Labor Act", *supra,* 6 Lab. LJ 441 at 448.

vision of the amendment has already been described. Its disarmingly specific language, never considered in committee hearings, drafted just before the full measure was voted on, and touching the sensitive nerve of union security, therefore represents "labor legislation . . . [that] is peculiarly the product of legislative compromise of strongly held views", *Labor Board v. Allis-Chalmers Manufacturing Company,* 388 US 175, 179 (1967), and for this reason, invokes the "familiar rule that a thing may be within the letter of the statute and yet not within the statute; because not within its spirit, nor within the intention of its makers", *Holy Trinity Church v. United States,* 143 US 457, 459 (1892); *National Woodwork Manufacturers Assn. v. Labor Board,* 386 US 612, 619, 620 (1967).

The makers of the 1951 amendments as we shall now demonstrate, contemplated compulsory unionism to require operating employees, like other railroad workers, to share the costs of negotiating and administering collective agreements and adjusting disputes. It was not enacted to require that the contracting parties tolerate "free riders" belonging to non-contracting organizations whose dues merely finance dissident activities or none at all. It was certainly not enacted to *encourage* unit employees to choose membership in a union that lacks statutory responsibilities rather than the one that is legally obligated to perform them. Yet all of these results flow from the decision below. Therefore, the alternate union exception must be harmonized with the basic statutory provision, mindful of the manifest purpose of Congress to fashion a coherent national labor policy.

A. Only Statutory Bargaining Representatives, Not Unions Without Contracts, Come Within the Controlling Concern of the 1951 Amendments.

The controlling congressional purpose in enacting Sec. 2, Eleventh was, as its terms disclose, to authorize the making

of contracts that would require all unit employees to contribute financial support to their statutory bargaining representative. That essential concern is expressed in Sec. 2, Eleventh (a) which permits such agreements to be made only by the statutory representative and only if membership is required in that labor organization. Under Sec. 2, Eleventh (b) only the statutory representative is permitted to make or be paid membership monies under checkoff agreements. *Hanson, supra,* holds that Sec. 2, Eleventh was constitutionally enacted to permit agreements that compel "financial support of the collective bargaining agency by all who receive the benefits of its work", 351 US at 238. *Hanson* rejected a constitutional challenge based upon forced association, *Street* emphasizes, "only" because Sec. 2, Eleventh is limited to "contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents." 367 US at 749.

Implicit in *Hanson* but explicit in *Street* is the view that the statutory responsibilities of the exclusive bargaining agent, and primarily its duty of fair representation, must control in interpreting Sec. 2, Eleventh, since these considerations were "decisive with Congress", 367 US at 762. Analysis of "the legislative history in the context of the development of [railroad] unionism under the [Act's] regulatory scheme," 367 US at 750, led this Court to a "not only 'fairly possible' but entirely reasonable"[42] limitation on the use of monies exacted under agreements permitted by the "broad language"[43] of Sec. 2, Eleventh. Because this history also shows the controlling purpose with which subparagraph (c) must be harmonized, we shall briefly summarize it here.

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[42] The construction was, therefore, not necessary because of the "serious doubt of constitutionality" rule.

[43] Dissenting opinion of Mr. Justice Black, 367 US at 784.

The history of union security on the railroads reflects a "firm legislative policy" against compulsory unionism, modified "only as a specific response" to recognition of the expenses incurred by an exclusive bargaining representative in fulfilling its statutory functions, 367 US 750-751. Before 1934, union security agreements existed principally where company unions had been installed. In 1934, the Act was amended to prohibit all union security and checkoff, after the standard unions failed to convince Congress to outlaw such contracts only if made by company unions, 367 US at 752.

In other amendments, however, Congress guaranteed the right of railroad and airline employees to organize and bargain collectively through independent, effective labor organizations and required carriers "to treat with" the duly designated bargaining representatives selected by a majority of any craft or class, 367 US at 759. By depriving individual employees and members of a minority union "of the right . . . they would otherwise possess" to choose any other to represent them, the amendments charged the exclusive representative with the duty of representing all employees in the craft or class, including "non-union or minority union members without hostile discrimination, fairly, impartially and in good faith."[44] In addition, the 1934 amendments created the National Railroad Adjustment Board, empowered to settle minor disputes in the industry, and provided that the 18 employee representatives of all of its divisions be chosen, and their salaries and expenses paid by, the labor organizations national in scope, 367 US at 760.

It was "essentially unfair", the unions argued, for an employee not to contribute his share towards the costs of the activities "resulting in the procurement of employee benefits", when the "collective bargaining repre-

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[44] *Steele v. Louisville & Nashville R. R. Co.*, 323 US 192, 200-204 (1944).

sentative . . . from whose existence and activities he derives most important benefits . . . is obligated by law to extend these advantages to him." It was particularly unjust, they added, because the statutory bargaining representative of railroad employees incurred more costs than unions in other industries because of the Act's "more complete and . . . complex administrative machinery", its mediation, arbitration and Presidential Emergency Board provisions, and its terms for maintenance of the Adjustment Board, 367 US at 761-762.

Because the statutory responsibilities of the exclusive bargaining representative were "the reasons advanced by the unions and accepted by Congress," 367 US at 768, *Street* holds that construction of Sec. 2, Eleventh must be commensurate with and respond to the scope of the duty fairly to represent all employees in the craft or class.

> ". . . [Congress] contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." 367 US at 764.

That duty is held only by the statutory bargaining representative and extends to minority union members as well as non-union employees in the craft, since the carrier is under an "affirmative duty to treat only with the true representative and hence the negative duty to treat with no other," *Virginian Ry. Co. v. System Federation No. 40*, 330 US 550 at 548 (1937).

Nevertheless SUNA claims to come within this purpose because its members employed by the Carrier support (1) officials who have in "several instances" processed their grievances under the Trainmen's contract and (2) representatives who have joined forces with the Trainmen in "concerted" negotiating movements and other efforts.

These contentions have not been accepted by the courts below, and properly so. The handling of grievances by persons who owe no duty to the unit as a whole, who are strangers to negotiation of the contract, with whom the Carrier may or may not "treat" as its interests dictate, and who lack legal authority or obligation in the "continuing process" of "day to day adjustments of the contract, and other working rules [or the] . . . resolution of new problems not covered by existing agreements"[45] not only conflicts with national labor policy[46] but, because gratuitous, lacks the element of reciprocal obligations that was central in the legislative concern.

Both organizations may have seen fit jointly to serve on various boards[47] or to participate, on occasion, in the negotiation of particular national agreements, but since the Trainmen exclusively represent the Carrier's yardmen, SUNA members among them are not sharing in the

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[45] *Conley v. Gibson,* 355 US 41, 46 (1957).

[46] The Labor Board, with judicial approval, has held that it is unlawful for an employer to entertain a unit employee's grievance presented or processed by a union other than his statutory bargaining representative, because it "effectively disrupt[s] the peaceful application of majority rule." *Federal Telephone and Radio Company,* 107 NLRB 649, 653; *The Youngstown Cartage Co.,* 146 NLRB 305, 307; *Hughes Tool Co. v. Labor Board,* 147 F. 2d 69 (5th Cir. 1945). But see *Douds v. Local 1250, Retail, Wholesale, etc. Union,* 173 F. 2d 764 (2d Cir. 1949); and the remarks of its critics in 63 Harv. L. R. 361 (1949) and Sherman, "The Individual and His Grievance—Whose Grievance Is It?", 11 U. Pitt. L. Rev. 35, 38, 55 (1949).

[47] Like other railway organizations, both support through a per capita assessment the activities of RLEA, a private organization of the presidents of the "standard" railroad labor unions, nonoperating, as well as operating, to formulate and sponsor national legislative and policy programs of common concern (A. 104-105, ¶ 6). Since it is chiefly concerned with legislative matters on the federal level, RLEA activities are at best an expense peripheral rather than "germane to collective bargaining" under *Brotherhood of Railway and Steamship Clerks, etc. v. Allen,* 373 US 113, 121, note 7 (1963) and *Street.* See Kaufman, *op. cit.,* p. 47.

cost of their representative's performance of its functions. Nor would these joint efforts, contrary to SUNA'S claims, explain why Congress would have legislated a "multi-union" union shop solely for operating employees. National "job protection" agreements, retirement benefits and unemployment compensation plans were negotiated by all "standard" railroad employee organizations, operating and nonoperating.[48] While these standard unions have, from time to time, presented their wage and rule demands in "concerted movements," the number of participants and their alignment has been fluid and "even the five operating unions have not been a cohesive group."[49] Although national bargaining on the grand lodge or international union level has increased in importance over the last thirty years, there has been no atrophy of collective bargaining at the level of the individual carrier or loss of autonomy or responsibility by the exclusive bargaining representative.[50]

Because all members of qualified operating unions share in the cost of dispute adjustment by the First Division,

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[48] Kaufman, *op cit.*, p. 47.

[49] *Ibid*, p. 48. Of the "concerted" movements from 1934 and 1950, Kaufman has written: "Although there is a prevailing popular impression that the operating unions tend to act in concert—at least with respect to national movements on wages and working conditions—there are, on the contrary, 'overlapping interests, jealousies, and . . . frequent conflicts' and 'occasionally members of one organization' have acted as strikebreakers in disputes involving a sister organization."

[50] Seidman, *op. cit.*, pp. 14-15; Kaufman, *op. cit.*, p. 47. Not the least of these responsibilities continues to be settlement of crew consist questions on each property, formerly before special boards of adjustment subsidiary to Arbitration Board 282 created by Public Law 88-108 (77 Stat. 132), and now under the normal procedures of the Act, *Brotherhood of Railroad Trainmen v. Akron & Barberton R. R. Co.*, 385 F. 2d 581 (D. C. Cir. 1967); *cert. den.*, 390 US 923 (1968). As Board 282's award recognizes, these crucial matters have never been the subject of national agreement, 41 LA 673, 693 (BNA, Wash. D. C., 1964):

the Second Circuit believes that a literal reading of the proviso is warranted.[51] However, the basic terms of the 1951 amendments negate any legislative concern to authorize union security for the joint benefit of the group of operating unions that support the statutory machinery for minor dispute adjustment. Only unions with collective bargaining rights can make union shop agreements covering operating employees: those that do not participate in the First Division equally with those that do. *Rohrer v. Conemaugh & Black Lick R. R. Co., supra,* 359 F.2d at 131. Were Congress convinced that support of the statutory adjustment procedures was sufficient to warrant alternate membership privileges, it would presumably have granted them to employees and qualified unions in the non-operating crafts as well, since those organizations furnish the same support to labor members of the other Adjustment Board divisions as do the qualified operating unions to the First Division, Sec. 3, First (h). Therefore, the Second Circuit's reading of subparagraph (c) cannot be reconciled with the basic concern of the 1951 amendments.

Nor is that view consistent with the argument premised upon the equitable sharing of representation costs that was "decisive with Congress", *Street,* 367 US at 762. In fact, as the operating unions' dues structure suggests,[52] the cost of an official's time and expenses on the First Division has been but a fragmentary and decreasing portion of the expense of administering labor agreements and settling and adjusting disputes.

Thus, grievances are typically handled first by the local chairman and the superintendent, then if not satis-

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[51] *O'Connell v. Erie Lackawanna, supra,* 391 F. 2d at 163.

[52] Their national dues are "nominal" and go to defray the cost of many other functions besides that of the salary and expenses of the officer serving part time on the First Division. See notes 5 and 10, *supra,* at pp. 6, 7.

factorily adjusted, by the general chairman and the vice-president in charge of industrial relations.[53] From there, unsettled disputes may also be referred either to voluntary special boards or "public law" boards.[54] Since the 1940's, in order "to secure prompt disposition" of these matters, over 400 special boards of adjustment have been created "by agreement usually on an individual railroad, and with a labor organization" to decide "disputes that normally would be sent" to the First Division.[55] Their decisions have "exceeded by several times the output of the First Division", and all of their cost except for that of the referee, is met only by the contracting parties.[56] In 1966, Sec. 3, Second of the Act was amended to provide for special boards, so-called Public Law Boards, "to decide disputes otherwise referable to . . . or . . . pending before the Adjustment Board for twelve months", Public Law 89-456, 80 Stat. 208, 209, June 20, 1966; and the costs of these boards are borne similarly.[57]

The statutory bargaining representative, on the other hand, in addition to its exclusive duty of fair representation, bears all of the expense of collective bargaining within the framework of the more costly mediation, arbitration and Presidential Emergency Board procedures of the Act and, except for the shared cost of the First Division, all of

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[53] "Procedures and Functions of National Railroad Adjustment Board—First Division". *Studies Relating to Railroad Operating Employees, supra,* note 13, p. 199.

[54] The establishment of Special Board of Adjustment No. 140 by respondents is a matter of official record. 22nd Annual Report, p. 49, 29th Annual Report, p. 75.

[55] 33rd Annual Report, p. 63.

[56] "Procedures and Functions of the National Railroad Adjustment Board," *supra,* note 53, p. 219.

[57] The Mediation Board compensates the neutrals. "Each [other] member of the Board shall be compensated by the party he is to represent." Sec. 3, Second as amended.

the expense of contract administration and dispute adjustment as well. Congress modified its previous policy of voluntary unionism as a specific response to these obligations, but members of non-contracting unions share in none of them.

B. The Decision Below Encourages Employees to Avoid Paying for the Cost of Collective Bargaining on Their Behalf by Holding That They Must Be Permitted to Contribute "Nominal" Dues to a Competing Union.

The court below has construed subparagraph (c) as though it were the basic provision of the statute rather than Sec. 2, Eleventh (a). Its decision conflicts with the primary purpose of Sec. 2, Eleventh by holding that qualified unions without statutory responsibilities to their members for the negotiation and administration of their labor agreements and for the adjustment and settlement of their disputes have to benefit from union shop equally with the union that must fulfill them. Correspondingly, it permits operating employees to avoid contributing to their statutory representative, or to any union representing a craft in which they may work, their share of the cost of furnishing these benefits. In short, in conflict with the controlling legislative purpose, it holds that petitioners cannot contract to eliminate free riders.

But even worse, the decision below imputes to Congress a purpose to *encourage* operating employees under union shop agreements to join organizations without collective bargaining responsibilities to them. Congress was aware that the costs of membership in the qualified operating unions vary in amount with the expense of collective bargaining on the property, that the dues are nominal and assessments are levied to meet the costs of negotiating and administering labor agreements. Indeed for this reason, Sec. 2, Eleventh was drafted to permit the col-

lection of assessments as a condition of employment.[58] Since it need not charge assessments that reflect the expense of collective bargaining, an operating union that does not contract on the line may offer employees a less costly membership than their statutory representative must charge.[59]

This Court has already noted the impact of competitive unionism under union shop agreements in such circumstances:

> " 'Employees would be tempted to desert the organization of the bargaining representative which was assuming its responsibilities under the Act in favor of another union which was not . . . and which could thereby offer cheaper dues. This would defeat the very purpose of the [union shop] amendment which is to compel each employee to contribute his part to the bargaining representative's activities on his behalf including its participation in the administrative machinery of the Act.' " *Pigott v. Detroit, T. & I. R. Co.*, 116 F. Supp. 949, 955, note 11, *aff'd* 221 F. 2d 736 (6th Cir. 1955), quoted in *Street, supra*, 367 US at 764, note 15.

These considerations led the court in *Pigott, supra,* to reject a literal reading of subparagraph (c) that would have permitted UROC to be selected as an alternate union, and they apply with equal force to a rival, minority union that supports a labor member on the First Division but does not contract with the railroad.

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[58] House Hearings, pp. 71, 257; *Street, supra,* 367 US at 766; note 10, *supra.*

[59] Levinson states: "The inclusion of assessments under the RLA, . . . is of particular moment for the operating unions. Because of the prevailing interunion rivalry, such a union is tempted as a matter of membership recruitment appeal to understate the amount of the membership dues it must levy and then make up the difference by levying membership assessments." "Union Shop Under the Railway Labor Act". *op cit.*, p. 450.

CONCLUSION.

Therefore, subparagraph (c) cannot be read literally without violating the very concerns for which Congress authorized union shop contracts: meeting the problem of "employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union."[60] "[B]elow the surface of the words [in subparagraph (c)] and yet fairly a part of them" is its sole legislative aim to prevent compulsory dual unionism or the shuttling between unions as one shuttles between jobs; and that "immanent" legislative idea[61] must be harmonized with the basic purposes of 1951 amendments, if we are to be "mindful of the manifest purpose of Congress to fashion a coherent national labor policy."[62] A construction of subparagraph (c) to permit contracts, like the one in issue here, that require employees to contribute their share of financial support to a bargaining representative that contracts for a craft in which they may work, effectuates both legislative concerns.

We respectfully request this Court to reverse the judgment below.

Respectfully submitted,

DAVID PREVIANT,

DAVID LEO UELMEN,
211 West Wisconsin Avenue,
Milwaukee, Wisconsin 53203,
Attorneys for Petitioner Dirks.

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[60] *Labor Board v. General Motors Corp.*, 373 US 734, 743 (1963), quoting *Radio Officers' Union v. Labor Board*, 347 US 17 (1954).

[61] Frankfurter, "Some Reflections on the Reading of Statutes", *supra*, note 28, p. 220.

[62] *Labor Board v. Allis-Chalmers*, *supra*, 388 US at 179-180.

JOHN J. NAUGHTON,
120 West Madison Street,
Chicago, Illinois 60602,

CLIFFORD D. HAWLEY,
666 Euclid Avenue,
Cleveland, Ohio 44114,
Attorneys for Petitioner Brotherhood of Railroad Trainmen.

JAMES P. REEDY,
516 West Jackson Boulevard,
Chicago, Illinois 60606,
Attorney for Petitioner Chicago, Milwaukee, St. Paul & Pacific Railroad Co.

Of Counsel:
GERRY M. MILLER,
GOLDBERG, PREVIANT & UELMEN,
211 West Wisconsin Avenue,
Milwaukee, Wisconsin 53203.